No. 87-5096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

QUINCY WEST,

Petitioner,

v.

SAMUEL ATKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

RICHARD E. GIROUX
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Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 8, 1987
CERTIORARI GRANTED OCTOBER 19, 1987

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Nov. 29, 1984	— Pro se Complaint filed.
Dec. 13, 1984	— Order of Partial Dismissal—dismissed as to McNamara and Gov. Hunt. Claims against Atkins are not frivolous and plaintiff may proceed against him.
March 7, 1985	— Issued Summons and Complaint.
April 22, 1985	— Motion for Summary Judgment and to Dismiss with Supporting Memorandum of Law, by defendants. Two affidavits to be forwarded.
May 6, 1985	— Affidavit of Samuel Atkins filed. Affidavit of Frank J. Nuzum filed.
May 31, 1985	— Quincy West's pro se response to defendant's Motion for Summary Judgment and to Dismiss.
June 7, 1985	— Order entered allowing Samuel Atkins' Motion for Summary Judgment.
	— Judgment filed. McNamara and Hunt having already been dismissed, action is now closed.
June 17, 1985	— Notice of Appeal filed by Quincy West.
Sept. 23, 1985	— N.C. Prisoner Legal Services files Motion for Leave to File a Brief of an Amicus Curiae on behalf of Quincy West.
Nov. 18, 1985	— Order filed assigning Richard E. Giroux of N.C. Prisoner Legal Services to represent Quincy West in his appeal to the Fourth Circuit Court of Appeals.
Sept. 3, 1986	— Panel Opinion and Judgment of the Fourth Circuit Court of Appeals.

DATE	PROCEEDINGS
Sept. 15, 1986	— Petition for Rehearing and Suggestion That Case Be Heard En Banc.
Nov. 12, 1986	— Order filed vacating panel opinion and ordering rehearing en banc.
Dec. 5, 1986	— Order filed granting Motion for Leave to File Brief of Amicus Curiae.
April 9, 1987	— En Banc Opinion and Judgment of the Fourth Circuit Court of Appeals.

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C., SEC. 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
RALEIGH DIVISION

No. 84-1346 CRT

QUINCY WEST

Prison Number 20846-26

versus

DR. SAMMUEL ADKINS,
MRS. RAE MCNAMARA,
GOV. JAMES B. HUNT

[Filed Nov. 29, 1984]

I. HAVE YOU BEGUN OTHER LAWSUITS IN FEDERAL COURT DEALING WITH THE SAME FACTS INVOLVED IN THIS ACTION?
Yes ( ) No (x)

II. PLACE OF PRESENT CONFINEMENT Caledonia Correctional Facility
P.O. Box 137, Tillery, N.C. 27887

III. PARTIES

(In Item "A" below place your name in the first blank and your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff Quincy West
Address P.O. Box 137, Tillery, N.C. 27887

(In Item "B" below place the full name of the defendant in the first blank, his official position in

the second blank, and his place of employment in the third blank. Use Item "C" for the name, position, and place of employment for any additional defendants.)

B. Defendant Adkins is employed as an Orthopedic-Surgeon at Central Prison Hospital

C. Additional Defendants Rae McNamara, Dir. N.C. Dept. of Correction, 831 W. Morgan St., Raleigh, N.C. 27606
Gov. James Hunt

IV. STATEMENT OF THE CLAIM

(State here as briefly as possible the FACTS of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. DO NOT GIVE ANY LEGAL CITATIONS OR ANY LEGAL ARGUMENTS OR CITE ANY STATUTES. If you wish to allege a number of related claims, number, and set forth each claim in a SEPARATE paragraph. Use as much space as you need. Attach extra pages if necessary.)

That Defendant Adkins through his negligence and deliberate indifference to Plaintiff's medical needs has denied Plaintiff proper and reasonable medical treatment for a badly torn achilles tendon. As a result of Defendant Adkins negligent treatment Plaintiff West has been subjected to intense and agonizing pain and permanent Injury. That Dr. Adkins improper treatment and his Deliberate indifference to Plaintiff West medical needs has repeatedly been brought to the attention of Defendants McNamara and Hunt.

(1) That on July 30, 1983, while playing volleyball at odom prison, at Jackson N.C. plaintiff West suffered a torn achilles tendon on his left leg above his heel string. Shortly thereafter plaintiff were transported to Woodland, N.C. and examined by a Dr. Stanley who were under contract with

the odom prison unit. Dr. Stanley's examination confirmed that plaintiff injury were a torn achilles tendon. Dr. Stanley directed that plaintiff be transferred to central prison.

(2) That on August 9, 1983, plaintiff West were transferred to central prison where he were examined by defendant Samuel Adkins, an orthopedic surgeon that plaintiff were in great pain and using crutches.

(3) Defendant Adkins after examining plaintiff stated that he should schedule plaintiff for surgery but that he want to experiment with plaintiff injury and see if the torn tendon would grow back together on its own. Defendant Adkins placed a cast on plaintiff leg.

(4) That defendant Adkins maintained a hostile attitude toward plaintiff West and refused to prescribe at plaintiff urgent request the necessary pain killer for relief, and plaintiff were returned to odom prison.

(5) That as a result of defendant Adkins denying plaintiff pain medication, plaintiff West were forced to consume dangerous dosage of asprin and plaintiff purchased various pain medication from other inmates.

(6) That in August 1983, plaintiff cast disintegrated and plaintiff were returned to central prison where defendant Adkins placed a heavier cast on plaintiff leg. Plaintiff again renewed his request for some pain medication but were denied such medication and were returned to odom prison.

(7) That in September 1983, defendant Adkins removed the cast from plaintiff leg and stated that the tendon in plaintiff leg should grow back together, and plaintiff again were denied medication for pain. Plaintiff leg were still badly swollen and hurting.

(8) That in late September 1983 plaintiff West while in segregation went on a hungry strike in

protest of administrative brutality and the lack of any medication for pain. Shortly afterward the unit physician Dr. Stanley gave plaintiff some motrin pills which failed to reduce the pain in plaintiff leg and achilles tendon.

(9) That on October 14, 1983 the Director's Subcommittee Recommended that plaintiff be demoted in custody and placed on intensive management. Plaintiff West immediately went on another hungry strike and on *November 8, 1983* plaintiff West were transferred to lock-up at central prison at Raleigh, N.C.

(10) That upon arriving at Central Prison and being searched plaintiff's motrin pills and ornade pills for his sinus were taken from him and given to the nurse at the nurse station. After plaintiff protested the nurse explained that it were a prison policy that such medication entering central be seized and that plaintiff would be scheduled to see the doctor so the medication could be re-prescribed by the Unit Doctor.

(11) That on November 10, 1983 plaintiff West wrote a letter to Warden Nathan Rice seeking his help in obtaining medication for both pain and sinus.

(12) That on November 11, 1983 plaintiff West wrote a letter to defendant Adkins pleading for defendant to see plaintiff due to excessive swelling and pain also plaintiff discussed his painful injury with the nurses in the cellblock each morning.

(13) That on or about November 15, 1983 Mr. Core, a central prison psychiatrist saw plaintiff swollen leg and promised to contact defendant Adkins and have plaintiff re-examined and given some medication or hospilized. However, plaintiff did not hear from defendant Adkins.

(14) That on December 5, 1983, a nurse informed plaintiff that he were scheduled to see defendant Adkins on December 7, 1983. Plaintiff

cannot recall if defendant Adkins in fact saw him on December 7th.

(15) That on January 10, 1984, plaintiff were carried to the orthopedic clinic where defendant Adkins examined his injury. After a five minute examination defendant Adkins stated that the tear in plaintiff leg had not closed up and that defendant wanted to see plaintiff again in one month. Plaintiff West told defendant Adkins that he could not walk and plaintiff again asked for some pain medication. Defendant Adkins stated that plaintiff should be able to handle the pain for a while because the injury would soon be closed up. Defendant Adkins upon plaintiff request wrote a prescription for plaintiff to be issued high top tennis shoes. . . . However no such shocs were given to plaintiff.

(16) That on January 11, 1984, plaintiff West wrote letters to defendant McNamara and Hunt asking that they intervene in the withholding of proper and adequate medical treatment for plaintiff by defendant Adkins.
Plaintiff also reminded defendants McNamara and Hunt that defendant Adkins had a bad reputation among the inmate class for his primitive form of surgery and the denial of adequate treatment.

(17) That defendant McNamara on two occasions returned plaintiff letters to central prison, where a lieutenant would come by plaintiff cell and ask a few questions and plaintiff never heard anything else.

(18) That on or about February 15, 1984, plaintiff West were carried to the orthopedic clinic and examined by defendant Adkins. Plaintiff achilles tendon were still swollen and sore. Defendant Adkins felt the achilles tendon area briefly and written something in the plaintiff medical jacket. Defendant Adkins then told plaintiff that

the tendon had not closed up. Plaintiff stated the hole in his leg had not closed any and that plaintiff leg were getting worser instead of better. At that point defendant Adkins got up and demostrated how plaintiff should learn to walk. . . .

However plaintiff could not possibly walk as instructed due to the stiffness, soreness, and swelling in his leg.

(19) That plaintiff further told defendant Adkins that he had not even received the high top tennis shoes to protect his achilles tendon which defendant Adkins had prescribed for plaintiff a month earlier on January 10, 1984. Before leaving *defendant Adkins said that he would see plaintiff on a regular basis . . . and that he may have to perform surgery and pull the tendon together.*

(20) That plaintiff leg continued to swell even larger and he suffered constant pain. Each time plaintiff sought some pain medication the (PA) physician assistant would schedule plaintiff to see defendant Adkins but Adkins never again met with plaintiff again.

(21) That on or about March 28, 1984 plaintiff showed nurse Earp his badly swollen leg. Nurse Earp stated that plaintiff needed to see defendant Adkins and plaintiff again signed up for the orthopedic clinic. Plaintiff stated that defendant Adkins on February 15, 1984 had promised to see plaintiff periodically. Nurse Earp promised to review plaintiff's medical record.

(22) That on March 29, 1984, Nurse Earp stated that he had looked at plaintiff's medical record and that defendant Adkins had wrote therein that he had released plaintiff from his care and that *defendant Adkins would not be seeing plaintiff anymore*, afterward Nurse Earp measured plaintiff's foot for a stocking which supposedly would releive the swelling in plaintiff achilles tendon, ankle, and his leg.

(23) That the stocking failed to alleviate any noticeable swelling in plaintiff's leg, and plaintiff once again wrote letters to defendant McNamara, defendant Hunt, and to the American Civil Liberties Union compalining of the lack of medical treatment.

(24) That in March 1984, plaintiff wrote a letter to one Dr. Eppley, another orthopedic Doctor at the central prison hospital. Plaintiff explained his injury and the experiences with defendant Adkins, and asked Dr. Eppley to examine plaintiff at his convenience. Dr. Eppley did not reply and a nurse told plaintiff that the letter probably were referred to defendant Adkins.

(25) That in March 1984, Plaintiff wrote a letter to Capt. Curry and asked to see him. Afterward plaintiff met with Capt. Curry and asked for assistance in getting some treatment for his injury. Capt. Curry also promised to help plaintiff stay at central prison after being removed from Intensive Management, in order that plaintiff, would be closer to the central prison medical facilities.

(26) That on June 1, 1984, plaintiff filed an administrative grievance against defendant Adkins. . . . . and alleged as follows;

> Dr. Adkins were treating me for a torn (achilles tendon) heel string. He has not saw me since 2/14/84. My heel string has not grown back. I suffer constant pain, and Dr. Adkins has not saw me since in spite of the Nurse, Mr. Earp referring me to Dr. Adkins and several letters.

On June 18, 1984, the Grievance after being processed were brought to the plaintiff to sign. The Grievance stated as follows: quote;

> Inmate is scheduled to see Dr. Adkins on 6-21-84. No further action recommended.

(27) That 6-21-84 came and passed without plaintiff West seeing Dr. Adkins. Plaintiff immediately wrote a letter to defendant McNamara asking that she investigate defendant Adkins and the central prison medical facilities.

(28) That on or about June 28, 1984, plaintiff West were abruptly transferred from central prison to the Intensive Management facility at Caledonia prison.

(29) That on July 3, 1984, plaintiff West accidentally took an overdose of aspirins in an effort to curb the pain in his leg and achilles tendon. Thereafter plaintiff signed up to see the P.A. in the medical center. Shortly afterward the unit P.A. placed plaintiff on mortrin for pain which fails to give plaintiff much relief from the pain.

(30) That on October 25, 1984, plaintiff's foot and leg swollen up even larger and the unit Doctor confined plaintiff to bed for a week. The following night on October 26, 1984, at 1:30 a.m. plaintiff West were again carried to the nurse station where the nurse called the Doctor at his home.

(31) That plaintiff foot and leg has been swollen and painful continuously since his injury and at no time since has plaintiff's progressed medically.

Plaintiff has a terrible limp in his walk. Plaintiff is unable to run, jump, sqwat and his entire foot and leg now has poor blood circulation. Plaintiff's injury in the absence of proper medical treatment has caused plaintiff leg to partially whither and weaken. All of which has cause plaintiff West to suffer great pain and mental anguish in violation of his constitutional rights.

That defendant Hunt and McNamara by their lapses and lack of sensitivity to inmate medical care has contributed equally to defendant Adkins

Lapses in causing plaintiff West to suffer a grievous irreparable loss.

V. RELIEF SOUGHT BY INMATE

(State briefly exactly what you want the Court to do for you. MAKE NO LEGAL ARGUMENTS. DO NOT CITE CASES OR STATUTES.)

(1) A declaratory judgement that Plaintiff is entitled to proper medical treatment. (2) That Plaintiff has been denied proper medical treatment. (3) An order directing the N.C. Dept. of Correction to have Plaintiff treated and examined by an Orthopedic Surgeon other than Defendant Adkins. (4) That the court appoint a party to examine Plaintiff's leg for trial evidence. (5) $1,000,000.00 in compensatory damages and $500,000.00 in punitive damages from Defendant Adkins. $640,000.00 in compensatory damages and $360,000.00 in punitive damages from Defendant McNamara, and a declaratory judgement again Gov. Hunt. Trial by jury requested.

Signed this 23 day of November, 1984

/s/ Quincy West
(Signature of Plaintiff)
(Signature of other
Plaintiffs, if necessary)

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Quincy West
(Signature of Plaintiff)
(Signature of other
Plaintiffs, if necessary)

11/23/84
(Date)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

ORDER OF PARTIAL DISMISSAL

This action comes on to be heard before the undersigned United States District Judge for a determination of frivolity under 28 U.S.C. Sec. 1915(d). The court finds, after carefully considering the plaintiff's complaint, that the claims against defendants Hunt and McNamara are frivolous because the plaintiff has failed to allege the personal involvement of those defendants in the deprivation of his Constitutional rights. Accordingly, the claims against those defendants are DISMISSED.

The claims against defendant Adkins are not frivolous, and the plaintiff may proceed against him.

SO ORDERED this 10th day of December, 1984.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

**MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT**

Filed April 22, 1985

TO: THE HONORABLE, THE JUDGE OF SAID COURT:

NOW COMES the Defendant, Dr. Samuel Atkins, Orthopedic Physician employed under contract at North Carolina Central Prison Hospital, Raleigh, North Carolina, by Lacy H. Thornburg, Attorney General of North Carolina, and Jacob L. Safron, Special Deputy Attorney General, his attorneys, who move the Court, pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the paperwriting filed herein and as reasons therefor respectfully show unto the Court:

1. That, this Honorable Court lacks jurisdiction over the subject matter of the paperwriting.

2. That, this Honorable Court lacks jurisdiction over the Defendant.

3. That, the contentions set forth in the paperwriting fail to state a claim upon which the relief sought can be granted.

4. That, the contentions set forth in the paperwriting are conclusory in nature and fail to adequately allege facts in support thereof.

5. That, the paperwriting is totally absent of any allegations concerning in what manner the Defendant has allegedly violated the Plaintiff's constitutional rights.

6. That the contentions set forth in the Plaintiff's paperwriting are captious, frivolous and utterly without merit.

MOTION FOR SUMMARY JUDGMENT

The Defendant moves the Court, in accordance with the provisions of Rule 56 of the Federal Rules of Civil Procedure, to enter Summary Judgment in his favor; this Motion being made upon the grounds that the Plaintiff's paperwriting and other matters of record set forth and attached to the Memorandum of Law submitted by the Defendant reveal that he is entitled to Summary Judgment as a matter of law.

The Defendant alleges in support of his Motion for Summary Judgment:

1. That, the Defendant adopts and again alleges the matters and things previously alleged and set forth above as a part of this Motion.

2. That, there are no genuine issues of material facts existing which are determinative of any right or duty which the Defendant owes the Plaintiff and, as a matter of law, the Defendant is entitled to summary judgment.

3. That, there are no genuine, relevant or material facts as to the deprivation of any constitutional rights of the Plaintiff and, therefore, no cause of action exists in his favor.

4. That, this action be dismissed and that any Motion to Dismiss be granted for any other lawful reason or ground that may pertain to this action.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ Jacob L. Safron
JACOB L. SAFRON
Special Deputy
Attorney General
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7188

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

DEFENDANT ATKINS' MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Filed April 22, 1985

Quincy West, an inmate in the custody of the North Carolina Department of Correction, brings this action against Dr. Samuel Atkins pursuant to 42 U.S.C. § 1983 for the violation of West's Eighth Amendment rights by Dr. Atkins' alleged failure to provide West with adequate medical treatment. West alleges that he suffered a torn achilles tendon on his left leg above his heel string while playing volleyball on July 30, 1983 at the Odom Correctional Center at Jackson, North Carolina, and that Dr. Samuel Atkins, an orthopedic physician on contract at North Carolina Central Prison Hospital at Raleigh

> . . . through his negligence and deliberate indifference to plaintiff's medical needs has denied plaintiff proper and reasonable medical treatment for a badly torn achilles tendon. . . .

This case is identical to CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984). Charles Edward Calvert, an inmate at the Maryland penitentiary, sued Dr. Nathaniel Sharp, also a private physician, pursuant to § 1983 for the violation of his Eighth Amendment rights. Dr. Sharp moved to dismiss the Complaint for lack of subject matter jurisdiction on the ground that he did not act under

color of state law. The trial court denied the motion. The Fourth Circuit disagreed and reversed, holding that Dr. Sharp neither acted under color of state law nor did he perform a "public function." "Dr. Sharp's specific function was diagnosis and treatment of orthopedic problems. This is clearly not within the *exclusive* prerogative of the state."

On April 2, 1985 the Fourth Circuit Court of Appeals also filed an opinion in CANNON v. BEANE, —— F.2d —— (4th Cir., April 2, 1985) (No. 85-6035) [Unpublished], a copy of which is attached. Cannon, a Virginia inmate, filed a § 1983 action against Dr. James W. Beane, a Richmond dentist, contending that Beane did not conduct himself in a professional manner and caused an infection in Cannon's throat. Cannon complained that Beane was nonprofessional and negligent by failing to wash his hands between his examination of an inmate with a gum infection and his examination of Cannon. As a result of Beane's failure to wash his hands, Cannon contended, he developed a persistent sore throat which required subsequent medical attention. In affirming the District Court's dismissal of Cannon's action for failure to allege that Dr. Beane was acting under color of state law, the Fourth Circuit stated that:

> As a jurisdictional requisite to maintain a 42 U.S.C. § 1983 action, Cannon must establish that Beane acted under color of state law. *See* POLK COUNTY v. DODSON, 454 U.S. 312 (1981). Beane, a private dentist, is not dependent upon the state for funds nor engaged in a public function. Beane was not granted by the state custodial or supervisory duties over the inmates. *See* CALVERT v. SHARP, 748 F.2d 861 (4th Cir. 1984); HALL v. QUILLEN, 631 F.2d 1154 (4th Cir. 1980).
>
> We conclude that Beane was not acting under the color of the state and we affirm the United States Magistrate's dismissal of Cannon's action for failure to state a claim cognizable under § 1983.

Like Dr. Sharp, Dr. Atkins had no custodial or supervisory duties. As Dr. Atkins testifies in his Affidavit, a copy of which is submitted herewith and made a part hereof:

> . . . I contracted with the North Carolina Department of Correction, Division of Prisons, to provide health care services for the Central Prison Hospital in Raleigh, North Carolina. According to my contract, my services began on September 1, 1981. Up until my termination effective March 20, 1985, I acted as an orthopedic physician for the Central Prison Hospital as provided in this contract. A copy of my contract with the North Carolina Department of Correction is attached to this Affidavit . . . When I served as the physician providing medical services for inmates at Central Prison Hospital I had no custodial or supervisory duties in relation to the inmates. I exercised my own judgment. I made my own medical decisions according to standards established by the American Medical Association, and not those established by the North Carolina Department of Correction.

Dr. Frank J. Nuzum, Director of Health Services for the Department of Correction testifies in his Affidavit, a copy of which is submitted herewith and made a part hereof, that:

> The Department of Correction has contracted with many medical services providers . . . All of these independent contractors have clauses in their contracts which provide for termination, by either party, upon a thirty day notice. These persons are *not* state employees and, thus, do not receive any of the benefits provided state employees such as retirement pensions, worker's compensation, Personnel Act rights, insurance, and the like. There are no Social Security funds nor state and federal taxes withheld from the checks paid to these persons for their services.

It is true that these medical services providers are under the authority of the respective warden or Unit Superintendent, but only administratively, as he is in command of the prison unit. The only order that the Superintendent might give one of these contractual medical services providers is to examine an inmate who has complained of a medical problem to the custodial staff. The Superintendent has no authority to exercise any medical judgment or to delegate any medical or clinical decisions. The medical services providers exercise their independent medical judgment and make their own medical clinical decisions, with no interference by custodial personnel.

* * * *

The contractual medical services providers are subject to regulations of the North Carolina Board of Medical Examiners, the North Carolina Medical Association, the North Carolina Board of Nursing and other similar medical associations. . . .

> None of the contractual physicians . . . have any custodial duties and each exercises his own independent medical judgment according to the standards of the medical profession to which he belongs, and not according to direction or regulation from any correctional personnel.
>
> Dr. Samuel Atkins . . . was under contract to provide orthopedic health care services to those inmates housed at Central Prison Hospital from September 1, 1981, until his contract was terminated on March 20, 1985. Dr. Atkins was an independent contractor and did not provide any custodial or supervisory services. He exercised his own independent medical judgment when providing medical services to inmates. . . . A copy of Dr. Atkins' contract with the Department of Correction is attached. . . .

In light of CALVERT v. SHARP, *supra*, there is a lack of subject matter jurisdiction which requires dismissal of Plaintiff's Complaint. In any event, even if this Court had jurisdiction over Dr. Atkins, which it does not, under BAKER v. McCOLLAM, 443 U.S. 137, 99 S.C. 2689, 61 L.Ed.2d 433 (1979), ESTELLE v. GAMBLE, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) and WESTER v. JONES, 554 F.2d 1285 (4th Cir. 1977), the Plaintiff's Complaint fails to state a cognizable claim for relief under § 1983.

For the foregoing reasons, Dr. Samuel Atkins moves the Court to grant this Motion and dismiss the Plaintiff's action for lack of subject matter jurisdiction.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

/s/ Jacob L. Safron
JACOB L. SAFRON
Special Deputy Attorney General
Attorneys for Defendant

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6035

ODELL CANNON, JR.,
Appellant,

versus

DR. JAMES W. BEANE,
Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
David G. Lowe, United States Magistrate—
(C/A No. 84-0508-R)

Submitted: February 27, 1985 Decided: April 2, 1985

Before ERVIN, CHAPMAN and WILKINSON, Circuit Judges.

PER CURIAM:

Odell Cannon, Jr., a Virginia inmate, filed this 42 U.S.C. § 1983 action against Dr. James W. Beane, a Richmond dentist, contending that Beane did not conduct himself in a professional manner and caused an infection in Cannon's throat. While in Henrico County Jail, Can-

non and two other inmates were taken to Beane for Emergency dental treatment. Pursuant to an oral agreement with the County of Henrico, Virginia, Beane routinely provides emergency dental services for persons incarcerated in the Henrico County Jail. Cannon complains that Beane was nonprofessional and negligent, by failing to wash his hands between his examination of an inmate with a gum infection and his examination of Cannon. As a result of Beane's failure to wash his hands, Cannon contends, he developed a persistent sore throat which required subsequent medical attention. The United States Magistrate dismissed Cannon's action for failure to allege that Dr. Beane was acting under color of state law.

As a jurisdictional requisite to maintain a 42 U.S.C. § 1983 action, Cannon must establish that Beane acted under the color of state law. *See Polk County v. Dodson*, 454 U.S. 312 (1981). Beane, a private dentist, is not dependent upon the state for funds nor engaged in a public function. Beane was not granted by the state custodial or supervisory duties over the inmates. *See Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984); *Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980).

We conclude that Beane was not acting under the color of the state and we affirm the United States Magistrate's dismissal of Cannon's action for failure to state a claim cognizable under § 1983.

As the dispositive issues have been decided authoritatively, we dispense with oral argument. The decision of the United States Magistrate is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

AFFIDAVIT

Filed May 6, 1985

I, SAMUEL ATKINS, M.D., being first duly sworn, do hereby depose and say:

That I contracted with the North Carolina Department of Correction, Division of Prisons, to provide health care services for the Central Prison Hospital in Raleigh, North Carolina. According to the contract, my services began on September 1, 1981. Up until my termination effective March 20, 1985, I acted as an orthopedic physician for the Central Prison Hospital as provided in this contract. A copy of my contract with the North Carolina Department of Correction is attached to this affidavit and incorporated by reference as Exhibit A. When I served as the physician providing medical services for inmates at the Central Prison Hospital I had no custodial or supervisory duties in relation to the inmates. I exercised my own judgment. I made my own medical decisions according to standards established by the American Medical Association, and not those established by the North Carolina Department of Correction.

This the 26 day of April, 1985.

/s/ S. W. Atkins
Affiant

Sworn to and subscribed before me this the 26 day of April, 1985.

/s/ Vickie S. Jacobs
Notary Public

My Commission Expires:
7/12/89

EXHIBIT A

STATE OF NORTH CAROLINA
DEPARTMENT OF CORRECTION

840 West Morgan Street
Raleigh 27603

CONTRACT FOR PROFESSIONAL SERVICES

This contract is hereby executed between the Division of Prisons, party of the first part, and Samuel W. Atkins, M.D., party of the second part, a Orthopedic Service, licensed by the State of North Carolina. The purpose of this contract is to acquire competent services in the discipline set forth above for all inmates assigned to Central Prison Hospital 3100.

WITNESSETH:

That for the purpose and subject to the terms and conditions hereinafter set forth, the Division of Prisons hereby employs said party of the second part; and said party of the second part accepts such employment;

The purpose, terms and conditions of this contract are as follows:

FIRST: The duties to be performed by the party of the second part are as follows:

To provide two Orthopedic Clinics per week. To see all orthopedic and neurological referrals. To perform orthopedic surgery as scheduled. To conduct ward rounds on post operative patients and on all patients assigned to the orthopedic service as often as necessary to insure patient's progress towards recovery.

To coordinate with the Physical Therapy Department and to order that therapy necessary to restore function.

To request the assistance of neurosurgical consultants on all spinal surgical cases. To provide on-call

orthopedic services 24 hours per day for emergency orthopedic evaluations or surgery.

To furnish 2 (days) of professional service per week in fulfillment of the duties above described.

SECOND: This employment shall begin on the 1st day of September, 1981, and unless sooner terminated by mutual consent or as hereinafter provided, shall exist and continue for five (5) years from date; provided that either party shall have the right to terminate this contract for employment upon thirty (30) days notice in writing to the other party, and further provided that the party of the first part may cause immediate termination of this contract due to lack of funds.

THIRD: As full compensation for services, the party of the second part is to receive from the party of the first part the sum of $495.00 dollars per clinic (payable upon receipt and approval of an invoice, DC-105. To use the 1964 Relative Value Schedule with a 12.0 conversion factor for surgical procedures.

IN TESTIMONY WHEREOF said parties have executed this contract; a copy to be delivered to each of the parties after final approval. The Director, Division of Prisons, is responsible for contract administration; and the Assistant Secretary for Management and Productivity is responsible for approval of invoices.

PARTY OF THE FIRST PART:

Division of Prisons
Rae McNamara, Director

By: /s/ S. P. Gowan
(Approved Authority)
Date 10/16/81

PARTY OF THE SECOND PART:

/s/ Samuel W. Atkins, M.D.
Date 10/15/81
242-24-1287)
(Social Security Number

APPROVED:

By: /s/ (Illegible)
(Section Manager)
Date 10/21/81
Assistant Secretary for
Management and Productivity

By: /s/ O. L. Gabriel
(Approved Authority)
Date 11-2-81

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

AFFIDAVIT

Filed May 6, 1985

I, FRANK J. NUZUM, PhD, being first duly sworn, do hereby depose and say:

That I am employed by the North Carolina Department of Correction, Division of Prisons, as Director of Health Services. I am a Health Care Administrator with almost twenty years experience in the field of Health Care Planning and Services. My responsibilities include the recruitment of Health Care personnel, both contractual and permanent employees, for the Division of Prisons.

The Department of Correction has contracted with many medical services providers, including physicians, physician's assistants and nurses, who provide medical services to inmates. All of these independent contractors have clauses in their contracts which provide for termination, by either party, upon a thirty day notice. These persons are *not* state employees and, thus, do not receive any of the benefits provided state employees such as retirement pensions, worker's compensation, Personnel Act rights, insurance, and the like. There are no Social Security funds nor state and federal taxes withheld from the checks paid to these persons for their services.

It is true that these medical services providers are under the authority of the respective warden or Unit Super-

intendent, but only administratively, as he is in command of the prison unit. The only order that the Superintendent might give one of these contractual medical services providers is to examine an inmate who has complained of a medical problem to the custodial staff. The Superintendent has no authority to exercise any medical judgment or to delegate any medical or clinical decisions. The medical services providers exercise their independent medical judgment and make their own medical clinical decisions, with no interference by custodial personnel.

The only "regulations" as such to which these contractual medical services providers are subject are "standing orders" and "protocols" outlined in the Departmental Health Care Manual. These standing orders are approved by the Unit Physician and provide for immediate medical treatment in certain instances so that a physician's assistant or unit nurse may commence medical treatment without necessarily contacting the Unit Physician. For example, if an inmate reported to sick call with Urticaria (hives), the standing order is to give the inmate "Benadryl (Diphenhydramine HCL) 50 mg po stat and Benadryl (Diphenhydramine HCL) 25 mg po tid until seen by physician extender or M.D.". There are a series of these standing orders and protocols provided in the Health Care Manual. However, custodial personnel have no authority to alter these treatments. That discretion lies wholly within the authority of the medical services providers.

The contractual medical services providers are subject to regulations of the North Carolina Board of Medical Examiners, the North Carolina Medical Association, the North Carolina Board of Nursing and other similar medical associations. Contractual nurses are subject to orders from unit physicians and physician's assistants. Likewise, contractual physician's assistants are subject to orders from the unit physicians.

None of the contractual physicians, physician's assistants, or nurses have any custodial duties and each exercises his own independent medical judgment according to standards of the medical profession to which he belongs, and not according to direction or regulation from any correctional personnel.

Dr. Samuel Atkins, who is named as a defendant in the above-captioned civil action, was under contract to provide orthopedic health care services to those inmates housed at Central Prison Hospital from September 1, 1981, until his contract was terminated on March 20, 1985. Dr. Atkins was an independent contractor and did not provide any custodial or supervisory services. He exercised his own independent medical judgment when providing medical services to inmates. The only possible order or direction the Warden might have given him would have been to order him to examine an inmate who had complained to custodial staff about a medical problem. The Warden, Nathan Rice, had no authority to direct Dr. Atkins in medical or clinical decisions. A copy of Dr. Atkin's contract with the Department of Correction is attached to this affidavit and incorporated by reference as Exhibit A.

This the 17th day of April, 1985.

/s/ Frank J. Nuzum
Affiant

Sworn to and subscribed before me this
the 17th day of April, 1985.

Nancy S. Wall
Notary Public

My Commission Expires:
May 24, 1988

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH, N.C.

(Title Omitted in Printing)

TRAVERSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, AND PLAINTIFF MEMORANDUM OF LEGAL POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, AND THAT DEFENDANT'S MOTION BE DISMISSED AS SHAM

Filed May 31, 1985

TO: The Honorable(s) Judge or Magistrate Presiding over the District Court of the United States for the Eastern District of North Carolina ..... at Raleigh, Greetings;

Now respectfully comes the pro se plaintiff, Quincy West, and move this Honorable Court to dismiss the paper writing of the defendant, and to accept jurisdiction in the case under those statutes together establishing original federal Court jurisdiction in state Civil Rights Cases.

The plaintiff disputes defendant's contention that this federal Court donot have jurisdiction. The plaintiff shows herein that this federal Court is the only Court that has jurisdiction to hear this case as shown more fully herein.

Jurisdiction (federal) is Proper

Clearly the ultimate issue in determining if a person is subjected to suit under section 1983 is whether the allege infringement of federal rights is fairly attributable to the state, 42 U.S.C.A. 1983. See: *Rendell-Baker v.*

Kohn, 457 U.S. 830, 838, 102 S. Ct. 2764, 2770, 73 L. Ed. 2d 418 (1982) and here the facts are cut and dry that the defendants action were carried out under color of state law, and this is a fact-bond inquiry issue. *Lugar v. Edmondson Oil Co.* 457 U.S. 922, 939, 102 S. Ct. 2744, 2755, 73 L. Ed. 2d 482 (1982).

Defendant Adkins signed a valid contract with the state of North Carolina to provide Orthopedic care for inmates in the North Carolina Dept. of Correction. His contract were signed and approved by Mrs. Rae McNamara, former state prison Director, who this Court released as a co-defendant of defendant Adkins on Dec. 10, 1984. Defendant Adkins signed the same type of contract as all prison employees and Adkins is surely as much an employee under color of state law when treating prisoners as any other prison employee who signed contracts to perform service. Adkins signed a contract to perform medical services while others agreed to perform services in the areas of custody, food service, prison enterprise, etc. The fact that defendant Adkins contend that he has another private Job is inmaterial to the fact that on the Job at Central Prison, if only for a moment, that defendant Adkins is acting under color of state law by virtue of the nature of his contract. And since the defendant has raised a 12(B)(1) Motion to Dismiss, plaintiff ask this Court to examine closely *defendant's Contract* and other evidence submitted in the record in determining whether suvject matter Jurisdiction donot or do exist. It is proper for this Court to make a distinction between defendant's contract even from other evidence handed down by the fourth Circuit Court of Appeals. *Adams v. Bain*, 697 f. 2d. 1213, 1219 (4th Cir. 1982).

The defendant obviously felt that he were acting under color of state law when he negligently subjected plaintiff to permanent injury because plaintiff notices that the N.C. Attorney General's office is defending Dr. Adkins. Adkins and his counsel has approached this case as if

jurisdiction were the only issue lost on them is the serious injuries which defendant Adkins has caused plaintiff to suffer.

> Defendant Adkins donot even attempt to deny the allegations against him, but seek to delay Justice by contesting the Jurisdiction of this Court

Surely the defendant should not be rewarded by such a mockery as a matter of law. Normally when there is a *factual question* common to the *merit* as well as to Jurisdiction, a resulting dismissal should be on the merits and not evasive tactics. *Bell v. Hood,* 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed 939 (1946)

> Defendant evidence and precedent Memorandum are misleading and false.

plaintiff West says that his case against Dr. Adkins is not like the case of *Calvert v. Sharp,* 748 f. 2d 861 (4th Cir. 1984) which the defendant now wraps himself in, nor is plaintiff case compatible in principle or theory to *Polk County* or *cannon* to clarify what the defendant are attempting to do by raising *Calvert v. Sharp,* 748 2d 861 (4th Cir. 1984) the plaintiff will show this Court that the cases which defendant rely on for a dismissal is simply trite and feckless and another reason why this Court should *dismiss the defendant's* Motion and Conduct a hearing on the merits of the case.

The case raised by defendant Adkins is *Calvert v. Sharp,* 748 f. 2d 861 (4th Cir. 1984) the defendant and the fourth Circuit is right. Dr. Sharp did not act under color of state law. *But Dr. Sharp's actions are not even close to those of defendant Adkins.*

(1) Dr. Sharp was not dependant upon the state of Maryland for funds. (2) Dr. Sharp did not draw a monthly check from the department of corrections or from the state, as defendant Adkins did. (3) Dr. Sharp did not sign a contract with the department of Corrections as defendant did, and (4) Dr. Sharp did consider

himself to be employed by the department of Correction even part-time as defendant Adkins did.

Dr. Sharp was physician employed by a *private medical group* known as the (CPPA) Chesapeake Physicians, PA Dr. Sharp was not dependant upon the state for funds because he worked for (CPPA) the Chesapeake Physician medical group and not the state of Maryland. Furthermore, the (CPPA) Chesapeake Physicians PA. itself was not dependant upon the state for funds. This case is hardly the same as the complaint filed against defendant Adkins. Adkins signed a contract with the N.C. dept. of Corrections and drew a salary as a result of that contract and services rendered. Dr. Sharp worked for a third party sub-contractor, and by statute. *Md Code Ann. Art 27 698 (1982)* Maryland has enacted provisions where medical services performed is not within the exclusive prerogative of the state.

Based on these facts one do not need be a Harvard Law School Graduate to distinguish the vast differences between the Activities of Dr. Sharp and *defendant Adkins.* Again these fact disprove defendant contention and support the plaintiff's that *defendant Adkins can be properly sued under color of state Law by virtue of his strange contract for services. Adams v. Bain,* 697 f. 2d. 1213, 1219 (4th Cir. 1982)

> This Court has pendent Jurisdiction to hear Plaintiff's Complaint.

Originally the plaintiff had sued Mrs. Rae McNamara, prison Director, and Gov. James Hunt as co-defendants of defendant Adkins. On Dec. 10, 1984, Judge Boyle dismissed defendants Hunt and McNamara from the Complaint.

Plaintiff West immediately filed an interlocutory appeal to the Fourth Circuit in order to preserve McNamara and Hunt as defendants. On April 13, 1985, the Fourth Circuit informed plaintiff West that the Court would review a final Judgment under 28 U.S.C. 1291 and consider the

dismissal of Hunt and McNamara as defendants at that time. Defendant Adkins is a legitimate subordinate of Mr. McNamara and she had knowledge of defendant Adkins act because plaintiff had wrote her several letters regarding defendant Adkins conduct which made her liable under the Fourth Circuit decision of *Bennett v. Gravell*, 323 f. Supp. 203 (D. Md.) aff'd. 451 f. 2d 1011 (4th Cir. 1971)

Plaintiff filed the interlocutory appeal to continue Mrs. McNamara as a defendant for the purpose of continuing this Courts pendent Jurisdiction to hear this case.

Pendent Jurisdiction as defined by the United States Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 545-57, 94 S. Ct. 1372 (1974) Allows a federal Court to decide claims alleging violation of the states Common Law. Regulation, Statutes, or Constitution that or not of a federal Constitutional nature, as long as plaintiff have a non-frivolous federal law claim as well arising from the same facts.

Plaintiff now believe that this Court retain pendent Jurisdiction even though Mrs. McNamara was dismissed as a defendant.

Plaintiff belief that this court still retain pendent jurisdiction is on the basis of *Rosado v. Wyman*, 90 S. Ct. 1207, 1212-1214, 397 U.S. 307, 402-402, 25 L. Ed. 2d 442 (1970) where the United States Supreme Court held that a federal Court has discretion to decide a claim within its Pendent Jurisdiction after the claim that give it Jurisdiction has become moot, in that case the Court said that Pendent Jurisdiction is based on "the commonsense policy" of the conservation of Judicial energy and the avoidance of multiplicity of litigation 90 S. Ct. at 1214 397 U.S. at 405.

Cases in which Jurisdiction of pendent claims was retained although the federal claim was dismissed without trial are cited in *13 Wrightmiller and Cooper federal Practice and Procedure, Jurisdiction*: 3567 N-35

CONCLUSION

Plaintiff thinks that this Court has Jurisdiction to hear his claims against defendant Adkins and only pray for *Pendent Jurisdiction* as an alternative.

Their are nothing mysterious nor fancy about this case at all. The plaintiff has sued defendant Adkins for negligence resulting in permanent damages to plaintiff. Defendant donot deny these charges, rather he attempts to escape Justice by contending that the Court donot have the Jurisdiction to determine the case on its merits. Plaintiff donot have any problem understanding why defendant seeks to escape answering the case on the merits . . . . but the facts of Jurisdiction and the merits are against the defendant.

The U.S. Supreme Court has advanced a number of other factors to determine if a private act is done under color of state law. The dependence of the actor on the State for funds, which Adkins surely is. *Rendell-Baker*, 457 U.S. at 840-41 102 S. Ct. at 2771-72 (1982) and the performance by the actor of a Public function. Id. at 842 102 S. Ct. at 2772.

Even more important is the fact that the Fourth Circuit held that a federal Court should also examine the evidence submitted in the record in determining that subject matter Jurisdiction do or don't exist. *Adams v. Bain*, 697 f. 2d 1213, 1219 (4th Cir. 1982). The defendant submitted a copy of his contract as part of his Motion and plaintiff contend that the contract alone will flush out the fact that defendant Adkins acted under color of state law as a matter of fact, in violation of plaintiff constitutional rights pursuant to *Estelle v. Gamble*, —— U.S. ——. 45 USLW 4023 (Nov. 30, 1976). Estelle establishes that the deliberate indifference by a *state* to the serious medical needs of an inmate is a violation of the 8th amendment and can support a 1983 action. Although a plaintiff must establish still that the defendant acted under color of state law. Polk Co. 454 U.S. at 315 162

S. Ct. at 448. Whether the Physician acted under a color of state law was not at issue in Estelle. Because Estelie was a physician who was the medical Director of the Texas dept. of Corrections.

Accordingly, this court have Jurisdiction to hear plaintiff's complaint under 28 U.S.C. 1343(3), 42 U.S.C. 1983, which together establish original federal Jurisdiction under *Monroe v. Pape*, 365 U.S. 167 (1961) with an alternative being a prayer for Pendent Jurisdiction under *Rosado v. Wyman*, Supra. based on the evidence plaintiff has submitted. The plaintiff's expectation of a federal forum is inextricably woven into its doctrine of Judicial Principles and law thereby protected by the first. Eighth, Ninth, and (14th) fourteenth amendments to the federal constitution.

Respectfully Urged

/s/ Quincy West
QUINCY WEST
Caledonia Prison
P.O. Box 137
Tillery, N.C. 27887

CW/cll/3

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

(Title Omitted in Printing)

ORDER

Filed June 7, 1985

This prisoner's civil rights action comes before the court on motions to dismiss and for summary judgment of the defendant Dr. Samuel Adkins. Dr. Adkins is an orthopedic physician employed under contract at North Carolina Central Prison Hospital in Raleigh, North Carolina. The basis for the defendant's motions is that this court lacks jurisdiction over the subject matter of the plaintiff's complaint because the defendant did not act under color of state law when he treated the plaintiff. The Fourth Circuit held in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984) that a private orthopedic specialist employed by a non-profit professional corporation which provided services under contract to the Maryland House of Corrections and the Maryland Penitentiary did not act under color of state law.

The defendant has submitted affidavits which state he is a contract physician and the defendant has a submitted a copy of his contract with the Department of Corrections.

On the basis of the evidence and other filings in this case, the court determines that the defendant Dr. Samuel Adkins is entitled to judgment as a matter of law. The defendant's motion for summary judgment is ALLOWED this 6th day of June, 1985.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

(Title Omitted in Printing)

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (——) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant Adkins' motion for summary judgment is allowed. Defendants McNamara and Hunt having already been dismissed from this action, this action is now closed.

No costs taxed.

THE ABOVE JUDGMENT WAS FILED AND ENTERED TODAY, JUNE 7, 1985, AND A COPY MAILED TO:

Mr. Quincy West
Caledonia Prison Unit
P.O. Box 137
Tillery, NC 27887

Mr. Jacob L. Safron
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602

United States Marshal
Raleigh, NC 27611

J. RICH LEONARD
Clerk

/s/ Lolita K. Pinnex
Deputy Clerk
Raleigh, North Carolina

Date June 7, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

QUINCY WEST,
Appellant,

versus

SAMUEL ATKINS; RAE MCNAMARA; JAMES B. HUNT,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terrence W. Boyle, District Judge—(CA 84-1346-CRT).

Argued: April 11, 1986 Decided: September 3, 1986

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

MURNAGHAN, Circuit Judge:

Presented by a North Carolina prisoner, Quincy West, with a claim under 42 U.S.C. § 1983 that he was deliberately denied adequate medical help by a physician under contract with the state to provide orthopedic care to prisoners, we find it premature to grant summary judgment simply on the grounds that *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 2667 (1985), bars recovery because a private doctor under contract with the state could not be engaged in state action. "The professional obligations and functions of a

private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." *Id.* at 863.

The common law distinction between employee and independent contractor, while not wholly irrelevant, since some of the differences between those two statutes bear on the constitutional issue presented, nevertheless, for common law purposes had different objectives. Whether Dr. Samuel Atkins was or was not a state employee for common law purposes simply does not indisputably settle the question of whether what he did amounted to state action.

To clear the decks and concentrate on the claim against Atkins, we affirm the grant of summary judgment against James B. Hunt, Jr., the then Governor of North Carolina, the doctrine of *respondeat superior* having no application in § 1983 actions. *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir. 1977). Rae McNamara, the Director of the prison system, on the other hand, according to the record before us, is shown to have received two complaining letters from West and to have conducted at least a cursory investigation. Any cause of action which may successfully be made out against her, therefore, stands on a basis of liability for her own acts. Consequently, if Atkins might be liable, grounds for requiring her to respond might also exist.

West was injured while playing basketball on July 30, 1983. The Achilles tendon on his left leg was torn. Atkins examined West and concluded that he should schedule surgery, but that he first wanted to see if the tendon would grow back together. Atkins placed West's leg in a series of casts and eventually West received medication for the pain. During September and October 1983 the leg remained swollen and pained West, but prison officials sanctioned West for refusing to work. West has alleged repeated, but frustrated, attempts to have proper attention paid to his torn Achilles tendon. He has allegedly gone without surgery to the present time.

West's action under § 1983 claiming a denial of his right to be free from cruel and unusual punishment followed.

To recover West must overcome two hurdles. He must establish a) that Atkins acted "under the color of state law" and b) that Atkins' course of conduct in attending West's injury showed deliberate indifference to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The second of those two hurdles has not been addressed in the district court, and there should be a remand for decision as to it.

While there may or may not be grounds for distinguishing *Calvert v. Sharp*, we perceive no need to rush to address that potentially troubling issue. Should it be determined, on remand, that the record does not permit a finding of deliberate indifference to a serious medical need, the case will be disposed of adversely to West, without the need for discussing the applicability *vel non* of *Calvert v. Sharp*.

Should the district court determine that there is evidence permitting an inference of deliberate indifference to a serious medical need, it will be time enough for that court, in the first instance, and then, in all probability, for us to address the question of whether action under color of state law could, on the record, be found to exist, bearing in mind that all inferences, on a summary judgment motion, are to be drawn in favor of the party opposed thereto.[1]

Accordingly, the grant of summary judgment in favor of James B. Hunt, Jr. is affirmed. The grants of summary judgment to Atkins and McNamara are vacated, and the case remanded to the district court for disposition in a manner consistent with this opinion.

AFFIRMED IN PART;
REMANDED IN PART.

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[1] *Calvert v. Sharp* was careful to point out the fact-bound nature of the inquiry as to whether the defendant's action has been under color of state law. *Id.* at 862.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

(Title Omitted in Printing)

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, there voted in favor of rehearing en banc Judges Russell, Widener, Hall, Sprouse, Chapman, Wilkinson and Wilkins. Those voting against rehearing en banc were Chief Judge Winter and Judges Phillips, Murnaghan and Ervin.

It is accordingly ADJUDGED and ORDERED that the decision and opinion of the panel shall be, and it hereby is, vacated.

It is further ORDERED that the Clerk will place the case on the calendar for oral argument before the en banc court.

/s/ [Illegible]
U.S. Circuit Judge
For the Court

Filed November 12, 1986

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6483

(Title Omitted in Printing)

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terrence W. Boyle, District Judge—(CA 84-1346-CRT).

Argued: December 8, 1986 Decided: April 9, 1987

Before WINTER, Chief Judge RUSSELL, WIDENER, HALL, PHILLIPS, SPROUSE, ERVIN, CHAPMAN, WILKINSON and WILKINS Circuit Judges, sitting en banc.

CHAPMAN, Circuit Judge:

In *Calvert v. Sharp*, 748 F.2d 861, 863 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), we held that "[t]he professional obligations and functions of a private physician establish that such a physician does not act under color of state law when providing medical services to an inmate." Prisoner West brought this § 1983 action against a private physician who was under contract for part-time employment with the state to provide two

orthopedic clinics per week at North Carolina Central Prison Hospital. Because we perceive no valid reason to overrule or distinguish *Calvert*, we affirm the district court's dismissal of the appellant's claim.

I.

West tore the Achilles tendon in his left leg while playing basketball on July 30, 1983. Dr. Atkins examined West and concluded that surgery could be avoided if the tendon would grow back together by itself. Atkins therefore placed West's leg in a cast and prescribed medication. West has alleged that the attention given to his injured leg was so inadequate as to be actionable under 42 U.S.C. § 1983.

North Carolina Central Prison Hospital, where West is imprisoned, has one full-time staff doctor, with additional medical services provided under "contracts for professional services" with area doctors. Dr. Atkins, by contract, conducted two clinics per week at the prison. Atkins also maintained a private practice. It does appear that, because West is a prisoner in "close custody," he is not free to seek outside medical assistance.

West's § 1983 theory alleged a denial of his right to be free from cruel and unusual punishment, as defined by the Eighth Amendment. West sought compensatory and punitive damages from Dr. Atkins, compensatory and punitive damages from Rae McNamara, Director of the Division of Prisons of the North Carolina Department of Corrections, and a declaratory judgment against James B. Hunt, Governor of the State of North Carolina.

II.

The Supreme Court held in *Estelle v. Gamble*, 429 U.S. 97 (1976), that the deliberate indifference by a state to the serious medical needs of an inmate is a violation of the Eighth Amendment and can support a § 1983 action. To establish a § 1983 claim, a plaintiff must also show

that the defendant acted under color of state law, an element which was not in issue in *Estelle*. The Supreme Court addressed the requirements for establishing that a defendant, who is a professional, acted under color of state law in the case of *Polk County v. Dodson*, 454 U.S. 312 (1981). *Dodson* held that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.* at 325 (footnote omitted). Instead, "[h]eld to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.* at 321. The court noted, moreover, that "[b]ecause of their custodial and supervisory functions, the state-employed doctors in [*O'Connor v. Donaldson*, 422 U.S. 563 (1975)] and *Estelle* faced their employer in a very different posture than does a public defender." *Dodson* at 320. Thus the clear and practicable principle enunciated by the Supreme Court, and followed in *Calvert*, is that a professional, when acting within the bounds of traditional professional discretion and judgment, does not act under color of state law, even where, as in *Dodson*, the professional is a full-time employee of the state.[1] Where the professional exercises custodial or supervisory authority, which is to say that he is not acting in his professional capacity, then a § 1983 claim can be established, provided the requisite nexus to the state is proved.

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[1] *Dodson* held that the employment relationship is only a "relevant factor" in determining whether the professional acted under color of state law. The primary consideration, established in *Dodson*, is the defendant's "function." Thus, the plaintiff would have to prove that the employment relationship created such an overbearing environment that the exercise of the independent professional judgment, the primary test, was impossible. The simple allegation of a close employment relationship between the state and the professional, absent any proof that that relationship had the effect of precluding independent judgment, is insufficient

In *Calvert* an inmate sued a private orthopedic specialist for an alleged failure to treat. The defendant was employed by a non-profit professional corporation, which in turn contracted with the state. We held that because private physicians exercise independent, professional judgment and render medical care in accordance with professional obligations, a physician when rendering such medical services does not act under color of state law. The defendant in *Calvert* had no supervisory or custodial functions.

We find the reasoning suggested by the appellant to differentiate the rule in *Dodson* from that enunciated in *Calvert* unpersuasive. Although the opinion in *Dodson* does point out that a public defender in effect plays a role adversarial to the interests of the state, that reasoning was the basis upon which the Supreme Court concluded that a professional may act without color of state law even when he is a full-time employee. In other words, even a full-time employee who is a professional can act without color of state law where his role in essence is adversarial to the interests of the state. Thus, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." *Dodson* at 321. We do not need to address the problematic issue of whether the nature of the doctor-patient relationship can at times be adverse to the interests of the state. Where the professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured.

The appellant is probably correct in his argument that the rule enunciated in *Dodson*, and followed in *Calvert*, has the effect of limiting the range of professionals subject to an *Estelle* action. This effect, however, is entirely consonant with the requirements of § 1983, which statute

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to satisfy the "color of state law" element of a § 1983 claim. The employment relationship is but one factor in determining whether the professional exercised independent judgment.

subjects the individual to liability only where he has acted under color of state law in violating a constitutional right. In any event, it is not for this court to tamper with the limitation of § 1983 liability established in *Dodson*. We therefore decline to overrule *Calvert v. Sharp*.[2]

III.

The appellant suggests that should this court decline to overrule its prior decision, we should distinguish it. We decline to do so. The fact that the doctor in *Calvert* was employed by a professional corporation, which in turn had contracted with the state, whereas Dr. Atkins, a sole practitioner, entered into that contract himself, makes no difference. A professional exercises his professional discretion pursuant to his professional obligations whether he practices alone or in a group. The effect of adopting the distinction suggested by the appellant would be to absolve one professional from liability concerning the same course of conduct and wilful failure to treat undertaken by another professional simply on the grounds that the former had associated himself with a group practice. Liability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties. The effect of such a rule would be to discourage any professional not associated with a group practice from serving the medical needs of prisoners. Such a rule would have the deleterious effect of increasing the cost and reducing the availability of medical services for prisons.

The other grounds of distinction proffered by the appellant are equally unpersuasive.

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[2] We also reject appellant's contention that the provision of medical services to the inmates is an "exclusive state function." Decisions made in the day-to-day rendering of medical services by a physician are not the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public. *See Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

IV.

We find no reason to disturb the district court's dismissal of the appellant's claims against appellees McNamara and Hunt. Pursuant to 28 U.S.C. § 1915(d), claims made by pro se litigants can be dismissed if frivolous; that is, if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979), *quoting Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Respondeat superior is not available for § 1983 actions, and so the appellant must allege personal involvement by appellees Hunt and McNamara in the deprivation of his constitutional rights. Because the alleged deprivation of constitutional rights in this case involved the alleged failure to render medical services properly, the "personal involvement" of these appellees must be relevant to the alleged deprivation. The appellant has alleged no facts which would show that appellees McNamara or Hunt had the authority to overrule the medical judgment of Dr. Atkins. The fact that the appellant had mailed to appellee McNamara two letters complaining about Dr. Atkins' treatment does not suffice to render McNamara liable for Atkins' medical judgments. We therefore affirm the district court's dismissal of these claims.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

When the panel heard this appeal, it could not, under our established practice, question the correctness of the holding in Calvert v. Sharp, 748 F.2d 861 (4 Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). At most, it could seek to distinguish *Calvert*, if a reasonable basis for distinction could be developed, or it could conclude that the correctness of *Calvert* was not presented because the physician who treated West was not guilty of deliberate indifference to West's serious medical needs. The panel opinion, in which I joined, pursued much the latter course. It sought to have the district court determine whether the physician was chargeable with deliberate indifference so that the necessity of addressing the correctness or distinguishability of *Calvert* could be certain.

An in banc court possesses greater authority. It is free to re-examine the correctness of the court's precedents and to overrule them if it determines that they were incorrectly decided. As a member of the in banc court, I am of the view that *Calvert* is an aberration and that it should be overruled. Alternatively, I think that *Calvert* should be confined to its facts and that this case is sufficiently different so as to render *Calvert* inapplicable.

I would therefore reverse the summary judgment in favor of Dr. Atkins, and I respectfully dissent from the majority's contrary decision. I concur, however, in affirming the dismissal of the action against McNamara and Hunt.[1]

I.

There are several grounds for concluding that services rendered by prison doctors—whether permanent members of a prison medical staff, or under limited contract with

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[1] The record contains no evidence that Hunt had notice of West's complaints and, in my view, such evidence is so scant as to McNamara's notice that I perceive no basis on which to hold them liable. Of course, § 1983 does not recognize liability under the doctrine of respondeat superior.

the prison—constitute action "under color" of state law, for purposes of § 1983, and that, as a consequence, *Calvert* was wrongly decided.

A. Prison doctors are state actors

Without doubt such state employees as prison guards and wardens are "state actors" subject to § 1983 liability. Moreover, the panel in *Calvert* implicitly conceded that a doctor who is (1) permanently employed on the medical staff of a prison, and (2) who has "custodial and supervisory duties" acts "under color of state law" when treating prisoners. The question then becomes whether the absence of either of these factors require a different conclusion. I think not.

All employment relationships are regulated by contract. The fact that the contractual arrangement between Dr. Atkins and the prison does not require Dr. Atkins to work exclusively for the prison should not strip his conduct of its essentially governmental nature when he is performing such service. Indeed, as the majority opinion notes, "[l]iability for a constitutional violation arising from a wrong done to an inmate should not rest on the contractual arrangement entered into by the putative defendant with third parties." *Ante* at 6.

The absence of custodial and supervisory functions is equally irrelevant to the state action issue. Although the Supreme Court, in Polk County v. Dodson, 454 U.S. 312, 319-21 (1981), invoked this factor to contrast the role of the public defender in *Polk* with that of the doctors in Estelle v. Gamble, 429 U.S. 97 (1976) and O'Connor v. Donaldson, 422 U.S. 563 (1975), I think that the *Calvert* panel misapplied this discussion in *Polk*. *Estelle* did not turn on the supervisory role of the doctor there; the complaint was premised solely on the medical treatment given. *See Estelle*, 429 U.S. at 103; *id.* at 104, n.10 (citing with approval several court of appeals decisions upholding claims of deliberate indifference without any mention of supervisory and custodial duties). *See also*

Polk, 454 U.S. at 331 (Blackmun J., dissenting) (noting that claims in *Estelle* and *O'Connor* were unrelated to the custodial and supervisory functions of the doctors there). I think it clear that *Polk* turned on the inherently adversarial relationship between public defenders and the state. 454 U.S. at 320-22.[2] The *Polk* Court discussed the custodial and supervisory functions of the doctors in *Estelle* and *O'Connor* simply in order to highlight the cooperative relationship between the doctors and the state and thus the absence of an adversarial relationship akin to that existing between public defenders and the state. There is no suggestion that performance of custodial and supervisory duties is a prerequisite for a finding that doctors act under color of state law. Indeed, such a requirement would bar many deliberate indifference claims: it seems unlikely that those with supervisory and custodial functions will often be directly involved with patient care, yet § 1983 is not available for claims based on the principle of respondeat superior.

There is no significant difference between the doctor-employees in *Estelle* and *O'Connor*, and Drs. Atkins and Sharp. While Dr. Sharp had a contract with a professional association which, in turn, had a contract with the state, it is fair to say that each of these doctors worked under contract with the state, received payment from state funds, were subject to regulation by state and professional review boards, and performed services that the state is obligated to provide to prison inmates.

The majority's assertion in this case, that where a "professional is acting within the bounds of professional discretion and obligation, his independence from administrative direction is assured" (*ante* at 5), is supported by nothing in the record, and completely disregards the American Medical Association Standards for Health Serv-

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[2] Although *Calvert* asserts that "[t]he loyalty owed by Dr. Sharp was potentially adverse to the interests of the state," 748 F.2d at 863, no basis for this speculation is offered, nor does one readily spring to mind.

ices in Prisons (1979), that prescribe the relationship between medical personnel and other prison officials as one of "close cooperation and coordination"; a "joint effort." Preface at i; Std. 102 & Discussion. The rationale employed by the majority would preclude a § 1983 action against any medical professional who has treated a prison inmate since, by virtue of the exercise of their 'independent professional' judgment, they could never be considered state actors—notwithstanding the holding in *Estelle v. Gamble*.

Defendants' brief argues that contractual medical service providers are "independent contractors rather than . . . employees," noting that no social security taxes are withheld from their paychecks and they receive no benefits enjoyed by state employees. But if this is the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to "private" actors, when they have been denied. Such a result is intolerable.

B. "Public Function" Rationale

Action "under color" of state law will be found if an otherwise private party performs a function that has been "traditionally the exclusive prerogative of the State." Blum v. Yaretzky, 457 U.S. 991, 1011 (1982). The incarceration of convicted criminals surely falls within that category. And because "[a]n inmate must rely on prison authorities to treat his medical needs . . . [it is] the *government's obligation* to provide medical care for those whom it is punishing by incarceration . . . . '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.'" *Estelle*, 429 U.S. at 103-04 (emphasis added) (citations omitted). *Accord* Bowring v. Godwin, 551 F.2d 44, 46-47 (4 Cir. 1977).

The panel in *Calvert*, 748 F.2d at 864, and the majority opinion here, *ante* at 6 n.2, asserted that medical

care is not within the exclusive prerogative of the state. That observation, however, is incorrect in the *prison context*, where the state has complete control over the circumstances and sources of a prisoner's medical treatment.[1] The view espoused here has been explicitly endorsed in other cases where the doctor operates under contract to the state. A good example is Ort v. Pinchback, 786 F.2d 1105, 1107 (11 Cir. 1986):

> . . . we hold that the district court erred as a matter of law in concluding that a physician who contracts with the state to provide medical care to inmates does not act under color of state law. In Ancata v. Prison Health Services, Inc., 769 F.2d 700 (11th Cir. 1985), we pointed out that medical personnel need not be state employees in order that their actions be considered state action under 42 U.S.C. § 1983. We held that the employees of a private entity hired by a county to provide medical care to jail inmates acted under color of state law so as to be subject to liability under § 1983. *Id.* at 703. Dr. Pinchback similarly performed "a function which is traditionally the exclusive prerogative of the state" when he took over the state's responsibility for attending to inmate medical needs. *Id.*; *see* Morrison v. Washington County, Ala., 700 F.2d 678, 683 (11th Cir. 1983).

See also Hall v. Ashley, 607 F.2d 789 (8 Cir. 1979) (upholding § 1983 deliberate indifference action against orthopedic surgeon operating under contract to prison). *Cf.* Briley v. State of Cal., 564 F.2d 849, 853, 856 (9 Cir. 1977) ("private" physician, "while serving as [county] medical examiner and advising at the [plea]

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[1] Although in *Calvert*, and unlike the situation in this case, the prisoners were allowed to go outside the prision to a doctor of their choice, this privilege was available only by virtue of a state statute. 748 F.2d at 864.

bargaining stage, was clearly clothed with the authority of state law, satisfying the 'state action' requirement of § 1983").

C. "Joint Action" Rationale

"It is enough that [a private party] is a willful participant in joint activity with the State or its agents" to render him liable under § 1983. United States v. Price, 383 U.S. 787, 794 (1966). *Accord* Lugar v. Edmondson Oil Co., 457 U.S. 922, 931-32 (1982). Thus, even if we assume that the doctor is not a public employee, the integral role that he plays within the prison medical system nevertheless qualifies his actions therein as "under color" of state law. The AMA Standards for Health Services in Prisons, described *supra*, provide that medical personnel and other prison officials are to operate in "close cooperation and coordination" with each other, in a "joint effort." There is no reason to believe that this mandate applies differently depending on the nature of the employment contract between doctor and prison.

It is significant to note that the Supreme Court in *Polk* recognized the viability of the joint participation rationale, but found it inapplicable to the adversarial relationship between the state and the public defender in that case. 454 U.S. at 322 n.12. More significant is the subsequent decision in Tower v. Glover, 467 U.S. 914 (1984), where the Court held that even a public defender acts under color of state law when he conspires with state officials to deprive another of constitutional rights. The same principle holds for prison doctors.

D. Impact of relationship with the state

Critical to *Calvert*'s conclusion that the doctor did not act under color of state law was the panel's repeated assertion that the doctor-patient relationship was in no way changed by virtue of the doctor's employment by the state. 748 F.2d at 863-64. From this the panel concluded that the doctor was an independent actor, rather than a

true agent of the state. However, this position ignores the AMA standards cited *supra*, which dictate close cooperation between the doctor and other state officials. Conversely, to the extent that *Calvert* is correct in its description of the ethical obligations of physicians, 748 F.2d at 863, these obligations would be the same for the *medical decisions* of the staff doctors in *Estelle* and *O'Connor*, who are acknowledged to act under color of state law.

Thus I conclude that *Calvert* is fatally flawed. It should not be followed here. Indeed, it should be overruled. Consistent with *Estelle* and *O'Connor*, Dr. Atkins should be found to have acted under color of state law in providing medical care to West.

II.

Even if my rejection of *Calvert* is not well-founded, I do not believe that decision controls the outcome here. I perceive the following valid bases for distinguishing this case from *Calvert*:

A. Absence of prisoner-patient choice of doctor/medical care

Although it argued that diagnosis and treatment are not the exclusive prerogative of the state, the *Calvert* panel answered the "public function" argument primarily by stressing that Maryland law allows inmates to go outside the prison and obtain medical care of their choice. In this case, however, North Carolina law bars all but minimum security prisoners (which West is *not*) from exercising such an option. West was thus totally dependent on the state's chosen medical care providers; for West, that meant Dr. Atkins. If there was any uncertainty in *Calvert* that the medical care received by that plaintiff was exclusively within the state's control, such uncertainty is not present in this case. Dr. Atkins was chosen by North Carolina to fulfill the state's constitu-

tional obligation to provide inmates like West with adequate medical care. North Carolina should not be permitted to plead a lack of responsibility because it delegated the task to a "private" party.

The Fifth Circuit adopted this view in Robinson v. Jordan, 494 F.2d 793, 794-95 (5 Cir. 1974):

> The trial judge alternatively stated: "It additionally appears that a doctor hired to treat prisoners is not acting under color of state law . . . . This holding was erroneous since Dr. Gates acted solely in his official capacity as a county health officer in treating appellant. This was state action . . . . Dr. Gates was not acting as a private physician but treated Robinson at the Sheriff's request because of his official employment.
>
> The cases relied on by the district judge holding that suits may not be maintained under Section 1983 against privately retained attorneys or court-appointed attorneys are inapposite. Robinson's detention prevented his seeking a physician of his choice. He did not enjoy the option of dismissing his doctor and securing another such as that open to a client dissatisfied with an attorney, appointed or retained. He was required to depend totally upon Dr. Gates, the county physician. (citations omitted)

B. Dependence on the state

Although *Calvert* found Dr. Sharp to have abundant non-state resources, 748 F.2d at 863, it appears (although the record is too sparse to be certain) that Dr. Atkins was heavily dependent on state funds. Moreover, it seems that Dr. Atkins' private practice, outside the prison, was significantly more limited than Dr. Sharp's. The risk that Dr. Atkins would feel compelled to adapt his medical judgments to accommodate his state employer, in conformity with the AMA's mandate to cooperate with the state, is far greater in these circumstances.

C. Absence of an intermediary

Dr. Atkins was employed directly by the state, much as any other state employee, including the doctors in *Estelle* and *O'Connor*. Dr. Sharp, however, was employed by a private association, which in turn was under contract to the state—a factor emphasized in *Calvert*, 748 F.2d at 863. The presence of the intermediary in *Calvert* helped to insulate Dr. Sharp from state administrative influence and pressure—a buffer unavailable to Dr. Atkins in this case.

These considerations serve to distinguish *Calvert* and to limit it to its discrete facts. If *Calvert* is not to be overruled, and it is my preference to do so, I think that it should be so limited.

For these reasons, I would reverse the summary judgment for Dr. Atkins that was granted by the district court and remand the case for further proceedings. In short, I would hold that Dr. Atkins acted under color of state law in treating West, and I would direct the district court to determine if Dr. Atkins is chargeable with deliberate indifference to West's medical needs.

Judge Phillips and Judge Ervin authorize me to say that they join in this opinion.

SUPREME COURT OF THE UNITED STATES

No. 87-5096

QUINCY WEST,

Petititoner

v.

SAMUEL ATKINS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1987